Supreme Court, U.S.
FILED
JUL 30 1991
OFFICE OF THE CLERK

(2)

No. 91-26

In The

Supreme Court of the United States

October Term, 1991

AVANTI SERVICES, INC.,

Petitioner,

v.

GLENDEL DRILLING COMPANY and PIONEER PRODUCTION CORPORATION,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF ON BEHALF OF GLENDEL DRILLING COMPANY, RESPONDENT, IN OPPOSITION TO PETITION

ONEBANE, DONOHOE, BERNARD, TORIAN DIAZ, MCNAMARA & ABELL
DOUGLAS W. TRUXILLO
(Counsel of Record)
Post Office Drawer 3507
Lafayette, Louisiana 70502-3507
Telephone: (318) 237-2660

Attorney for Respondent, Glendel Drilling Company

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

A reading of the petitioner's writ of certiorari brought back to mind something a law professor once said concerning post-trial briefs and arguments:

> "When all else fails and you lose on the facts and law, argue that the law should be changed."

However, this case neither presents the issues, facts or legal significance to warrant such action by this Court.

1.

A review of the petitioner's application reveals he more or less concedes at this late stage, that a change in the law would be necessary for him to prevail. Significantly, the petitioner waited for this forum to raise for the first time the argument that contractual indemnity between parties of equal bargaining power should be against public policy under general maritime law. There has been no discussion, evaluation, factual preparation or other such development made in the case below concerning this new argument. Thus, the first question is not ripe for review.

2.

Furthermore, although the petitioner claims that the Fifth Circuit Court of Appeals decided this case in a way that is "in conflict with a State Court of last resort", the truth of the matter is that the Louisiana Supreme Court is in total agreement with the ruling below and would have reached the exact same result had this case been before it,

QUESTIONS PRESENTED – Continued

i.e., the contractual indemnity would have been allowed under the general maritime law. Thus, certiorari for the second question should be denied.

3.

Finally, the third question posed to the Court has been the subject of numerous cases both herein and below and involves a fact-specific inquiry not appropriate for certiorari review based on this record. Therefore, it should also be denied.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

STATUTES INVOLVED 1

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENTS 3

ARGUMENT 7

I. NEW ARGUMENT REGARDING PUBLIC POLICY AND CONTRACTUAL INDEMNITY 7

II. NO STATE COURT CONFLICT 14

III. AVANTI/GLENDEL CONTRACT MEETS MARITIME CONTRACT CRITERIA 17

CONCLUSION 23

TABLE OF AUTHORITIES

Page

CASES

American Stevedores v. Porello, 330 U.S. 446, 67 S.Ct. 847 (1947), aff'g in part and rev'g in part, *Porello v. United States*, 153 F.2d 605 (2nd Cir. 1946) 7

Bolfa v. Pool Offshore Co., 623 F.Supp. 1177 (W.D.La. 1985) 18

Cason v. Diamond M. Drilling Co., 436 So.2d 1245 (La.App. 1st Cir. 1983) 16, 19

Corbitt v. Diamond M. Drilling Co., 654 F.2d 329 (5th Cir. 1981) 8, 18

Daughdrill v Ocean Drilling and Exploration Co. (ODECO), 665 F.Supp. 477 (E.D.La. 1987) 8, 9

Davis & Sons, Inc. v. Gulf Oil Corp., 919 F.2d 313 (5th Cir. 1990), reh'g denied, 924 F.2d 1054 (5th Cir. 1991) 21

DeShaney v. Winnebago County Depart. of Social Services, 489 U.S. 189, 109 S.Ct. 998 (1989) 7

Domingue v. Ocean Drilling and Exploration Co., 923 F.2d 393 (5th Cir. 1991) 13, 21

Giacona v. Marubeni Oceano (Panama) Corp., 623 F.Supp. 1560 (S.D.Tex. 1985) 8

Herb's Welding, Inc. v. Gray, 470 U.S. 414, 105 S.Ct. 1421 (1985), rev'g, 711 F.2d 666 (1983), remanded, 766 F.2d 898 (1985) 20

TABLE OF AUTHORITIES – Continued

Page

Kossik v. United Fruit Co., 365 U.S. 731, 81 S.Ct. 886 (1961), reh'g denied, 366 U.S. 941, 81 S.Ct. 1657 (1961) 9

LeBleu v. Mud Control Equipment Corp., No. 90-4248 (E.D.La. 1991) (LEXIS, Genfed library), (WESTLAW, Allfeds database) 18

Lefler v. Atlantic Richfield Co., Inc., 785 F.2d 1341 (5th Cir. 1986) 7

Lewis v. Timco, Inc., 716 F.2d 1425 (5th Cir. 1983), remanded, 736 F.2d 163 (5th Cir. 1984), reh'g denied, 744 F.2d 94 (5th Cir. 1984) 18

Lirette v. Popich Brothers Water Transport, Inc., 699 F.2d 725 (5th Cir. 1983) 8

Odell v. North River Insurance Co., 614 F.Supp. 1556 (W.D.La. 1985) 12, 18

Porche v. Gulf Mississippi Marine Corp., 390 F.Supp. 624 (E.D.La. 1975) 8

Roberts v. Williams-McWilliams Co., Inc., 648 F.2d 255 (5th Cir. 1981) 18

Rodrigue v. Legros, 563 So.2d 248 (La. 1990) ..... *passim*

Seaux v. Lynn, 708 F.Supp. 134 (E.D.La. 1989) 8, 18

Sisson v. Ruby, ___ U.S. ___, 110 S.Ct. 2892 (1990) 20

Smith v. United States, 497 F.2d 500 (5th Cir. 1974) 8

Sohyde v. Coastal State Gas Producing Co., 644 F.2d 1132 (5th Cir. 1981) 13, 14

Spinks v. Chevron Oil Co., 507 F.2d 216 (5th Cir. 1975) 8, 18

TABLE OF AUTHORITIES – Continued

Page

Stoot v. Fluor Drilling Services, Inc., 851 F.2d 1514 (5th Cir. 1988) 16, 17

Terry v. Rebstock Drilling Co., 601 F.Supp. 820 (E.D.La. 1985) 18

Theriot v. Bay Drilling Corp., 783 F.2d 527 (5th Cir. 1986) 18

Thurmond v. Delta Well Surveyors, 836 F.2d 952 (5th Cir. 1986), reh'g denied, 844 F.2d 788 (5th Cir. 1988) 21

Transcontinental Gas Pipe Line Corp v. Mobile Drilling Barge Mr. Charlie, 424 F.2d 684 (5th Cir. 1970) 18

U.S. v. Seckinger, 397 U.S. 203, 90 S.Ct. 880 (1970), reh'g denied, 397 U.S. 1037, 90 S.Ct. 1255 (1970) 7

Vickers v. Chiles Drilling Co. v. Ingersoll-Rand Co., 822 F.2d 535 (5th Cir. 1987) 18

STATUTES

33 U.S.C.A. § 905(b) (West 1986) 10

33 U.S.C.A. § 905(c) (West 1986) 4, 10

43 U.S.C.A. § 1331 et seq. (West 1986) 20

Texas Statute Tex. Civ. Parc. and Rem. Code Annot. § 127, 001 et seq 1

La. R.S. Annot. 9:2780 ..... *passim*

STATUTES INVOLVED

Petitioner avers that La. R.S. Annot. 9:2780 (known as the Louisiana Oilfield Indemnity Act or LOIA and sometimes referred to as the Louisiana Anti-Indemnity Statute) and Texas Statute Tex. Civ. Parc. and Rem. Code Annot. § 127, 001 et seq. (sometimes referred to as the Texas Anti-Indemnity Statute) are "involved" in this litigation. Neither statute was enforced, overruled nor construed by any of the lower courts in this matter. The Court below determined that the contract in question was to be interpreted under the general maritime law precluding discussion of such statutes dealing with indemnity in oilwell-related contracts.

STATEMENT OF THE CASE

The plaintiff in the principal demand, Beverly Locks Lewis, brought a general maritime death claim in Federal Court with respect to her husband's drowning death which occurred in April, 1985. Named as defendants were Glendel Drilling Company (hereinafter sometimes referred to as "Glendel"), the owner of the inland drilling barge from which her husband allegedly fell, Pioneer Production Company, the lease holder, Avanti Services, Inc. (hereinafter sometimes referred to as "Avanti"), the turnkey contractor who had employed Glendel on behalf of Pioneer, and Schlumberger Well Services, the alleged Jones Act employer of the decedent. Glendel, respondent herein, brought a Cross-Claim against Avanti, petitioner herein, based on the reciprocal indemnity provisions contained in a drilling barge contract. Subsequent thereto, all

of the claims of the plaintiff against all parties, including his Jones Act employer, were settled, reserving all of the contractual indemnity claims by Glendel and Pioneer Production Company against Avanti Services, Inc.

Regarding the cross-claim of Glendel which is the subject of this appeal, petitioner, Avanti, specifically contracted for respondent, Glendel, to provide Glendel's submersible drilling barge, the *Glendel Rig 18*, to perform drilling services in a navigable water location. Avanti also called the decedent out to location as its subcontractor to perform certain work on board the inland drilling barge. While decedent was transferring from the *Glendel Rig 18* to an adjacent pipe barge, he apparently fell from a watertight door in the bulkhead into the water and drowned. Glendel had tendered its defense and indemnity to Avanti pursuant to the reciprocal indemnity provisions contained in the Avanti/Glendel contract. The indemnity agreement in the Avanti/Glendel contract was not "typical", in that it was a completely reciprocal indemnity agreement between the vessel owner and the lease operator. This is termed a "knock-for-knock" agreement wherein each party agrees to indemnify the other with regard to injuries each party's respective employees or invitees incur. When Avanti took no action, Glendel settled the death claims of the widow and her five children and subsequently moved for summary judgment on the contractual indemnity claims against Avanti.

The District Court found as a fact that maritime obligations were being pursued at the time of the decedent's death, and after considering the maritime nature of the drilling barge contract, the Court concluded that the contract was to be interpreted under maritime law. The

District Court further found the reciprocal indemnity agreements between parties of equal bargaining powers should be given full force and effect and thus, Avanti was obligated to indemnify Glendel with respect to Avanti's invitees' injuries or deaths. Petitioner did not challenge, at the District Court level, the fact that the drilling barge was a vessel for the purposes of maritime law. Further, petitioner did not argue at any lower level that the contractual indemnity agreements between parties of equal bargaining power should be void as being against public policy under the general maritime law. Therefore, there was no factual development, discussions, testimony of industry representatives or maritime operations experts, regarding either the vessel status of the inland drilling barge or the public policy argument such as to warrant review here.

SUMMARY OF ARGUMENTS

1.

Petitioner presents for the first time to any Court in this case a question as to whether contractual indemnity provisions should be void under the general maritime law as a matter of public policy. Petitioner never before argued that "liability shifting" or contractual indemnity should be disallowed under the general maritime law. Without the matter having been previously briefed, discussed below by any of the Courts, or factually developed through testimony of industry representatives, the issue clearly is not ripe for discussion or review by this Court at this time.

In any event, the general maritime law has traditionally allowed contractual indemnity provisions between parties of equal bargaining power so as to support the public policy that parties in business situations should have total freedom of contract. In fact, reciprocal indemnity agreements such as those found in the Avanti/Glendel contract should be favored in the law, in that it simplifies the litigation process, making each party liable for its own employees' injuries on the same job site. This fact was recognized by the United States Congress in 33 U.S.C.A. § 905(c) which allows reciprocal indemnity provisions under federal law between a longshoreman employer and a shipowner. Thus, where each party clearly and unequivocally agrees to defend and indemnify the other for any costs, defense, loss or liability for damages arising out of or resulting from the death or bodily injury to their employees, such an indemnity provision should be upheld.

2.

There is no rational reason to apply the Louisiana Oilfield Anti-Indemnity Act (LOIA) (La. R.S. 9:2780) as "substitute" maritime law in that the underlying principles of maritime contractual indemnity have been well developed by the federal courts, particularly in the Fifth Circuit Court of Appeals (as recognized by the Louisiana Supreme Court) without the need to resort to state law, such that parties to similar contracts have developed "stable commercial expectations" regarding the same. Inequities would result at this stage to have the courts judicially apply a novel choice of law theory to invalidate an indemnity provision contemplated and accounted for

by the parties in their negotiations, risk allocations, insurance procurements and financial considerations for undertaking the requested commercial enterprise.

Petitioner also argues for the first time that the Louisiana Oilfield Indemnity Act should be applicable in the "interest of safety", even though there has been no factual development whatsoever in the case below as to whether LOIA would actually promote safety in a way greater than a reciprocal indemnity provision between parties to a particular job site. In all probability, enforcing the indemnity clause against Avanti will promote safety, since Avanti was the one entity in control of hiring all of the contractors in this case. In fact, Glendel, as the drilling company, would have had many more individuals on board the vessel at all times, thus, its requirement to indemnify Avanti for any injuries to Glendel employees caused by anyone's negligence would promote the overall safety on the job site to preclude injuries from any source, not just for the indemnitee's own negligence.

3.

With regard to what criteria should be used to determine whether a particular contract is maritime or non-maritime, this issue was raised below and subjected to careful scrutiny by the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit Court has consistently held that contracts to provide a specific drilling barge for drilling operations on navigable waters, such as that between Avanti and Glendel, are maritime contracts in light of their significant relationship to maritime activity.

The "conflict" and/or "confusion" concerning criteria for maritime contracts arise where parties attempt to classify other types of contracts to provide certain related oilfield services which can be performed either on land or on drilling barges, as maritime. There, parties attempt to have a contract for land-based service construed under maritime law, simply because such service may temporarily be performed on a drilling barge over navigable waters. This is not such a case. The drilling barge involved herein was a single designed vessel with the express purpose of being able to navigate to a water location and operate where no land-based equipment could.

The Fifth Circuit has recognized that determining what constitutes a maritime contract is a fact-specific analysis. And, while the present case was pending for rehearing, the Fifth Circuit decided two cases specifically listing a set of criteria for making the determination of whether offshore oilfield-related contracts are, or are not, maritime. The applicable criteria set forth in those decisions would render the same result regarding contracts to supply drilling barges as reached by the Court in this case. The Court found that the contract between Avanti and Glendel which called for the use of an inland drilling barge to perform drilling work on a navigable water location, not accessible by any other means, had the type of impact on traditional maritime activity, i.e., the navigation of vessels in and around the navigable water location, which required that such contract be governed by maritime law. No review of this decision is therefore needed.

ARGUMENT

I.

NEW ARGUMENT REGARDING PUBLIC POLICY AND CONTRACTUAL INDEMNITY

For the first time during these proceedings, petitioner has made the argument that contractual indemnity provisions in maritime contracts should be disallowed under the general maritime law as being against public policy. This argument was not plead in its answer, in the Pre-Trial Order, argued to the Court of Appeals as a ground for reversing the District Court, or raised in its Petition for Rehearing before the Court of Appeals. Therefore, this Court should decline to consider this argument at this time insofar as this issue is not properly before the Court. See, *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 109 S.Ct. 998, at p. 1003 n.2 (1989). (See also cases cited therein.)

In any event, the general maritime law has traditionally enforced contractual provisions for indemnity, even for one's own negligence, so long as such provisions are clear and unequivocal and are found in contracts involving parties of equal bargaining power. Such is the case in the Glendel/Avanti contract. The courts have recognized with virtual unanimity that such indemnity contracts shall be enforceable as between parties who bargained at arm's length and from relative equal positions. *U.S. v. Seckinger*, 397 U.S. 203, 90 S.Ct. 880 (1970), reh'g denied, 397 U.S. 1031, 90 S.Ct. 1255 (1970); *American Stevedores v. Porello*, 330 U.S. 446, 67 S.Ct. 847 (1947), aff'g in part and rev'g in part, *Porello v. United States*, 153 F.2d 605 (2nd Cir. 1946); *Lefler v. Atlantic Richfield Co., Inc.*, 785

F.2d 1341 (5th Cir. 1986); *Lirette v. Popich Brothers Water Transport, Inc.*, 699 F.2d 725 (5th Cir. 1983); *Corbitt v. Diamond M. Drilling Co.*, 654 F.2d 329 (5th Cir. 1981); *Roberts v. Williams-McWilliams Co., Inc.*, 648 F.2d 255 (5th Cir. 1981); *Spinks v. Chevron Oil Co.*, 507 F.2d 216 (5th Cir. 1975); *Smith v. United States*, 497 F.2d 500 (5th Cir. 1974); *Seaux v. Lynn*, 708 F. Supp. 134 (E.D.La. 1989); *Daughdrill v. Ocean Drilling and Exploration Co. (ODECO)*, 665 F.Supp. 477 (E.D.La. 1987); *Giacona v. Marubeni Oceano (Panama) Corp.*, 623 F.Supp. 1560 (S.D.Tex. 1985); *Porche v. Gulf Mississippi Marine Corp.*, 390 F. Supp. 624 (E.D.La. 1975); *Rodrigue v. Legros*, 563 So.2d 248 (La. 1990).

As the Fifth Circuit in *Spinks v. Chevron* stated:

> We observed . . . , that no public policy prohibits parties from using a contract to shift liability for the payment of tort claims. . . . 507 F.2d at p. 226.

Further, that same circuit stated:

> It is well settled that a party may contract against liability for its own negligence. The agreement, however, must clearly indicate the intentions of the parties. . . . *Roberts v. Williams-McWilliams, Inc.*, 648 F.2d 255 at p. 264 (5th Cir. 1981).

As such, it appears that public policy does not support avoidance of contractual indemnity liability where parties are of equal bargaining position, and there is no public industry, such as the government or common carrier liability, involved. In fact, public policy actually supports the upholding of contractual indemnity agreements

which are clear and unequivocal. As one court concisely stated:

> Where there is neither industry affected with the public interest nor an unequal bargaining position between the parties, public policy actually dictates the upholding of freedom of contract principles, because it is generally economically efficient to allow private parties to allocate the costs and risks involved in doing business. *Giacona v. Marubeni Oceano (Panama) Corp.*, 623 F.Supp. 1560, at pp. 1567-68 (S.D.Tex. 1985).

The same freedom of contract principles were echoed in the case of *Daughdrill v. Ocean Drilling and Exploration Co. (ODECO), supra,* wherein the Court declared that parties to maritime contracts are free to agree as they will, if they are in equal bargaining positions. The Louisiana Supreme Court in the case of *Rodrigue v. Legros, supra,* which we will discuss below, also recognized this in *upholding* a contractual indemnity provision found in a similar drilling barge contract.

Avanti argues that contractual indemnity has "no place in maritime law" and tries to analogize the matter to tort indemnity. Tort indemnity and the cases discussing same truly have no place in the negotiation of such contracts. The Court, in *Kossick v. United Fruit Co.*, 365 U.S. 731, 81 S.Ct. 886 (1961), reh'g denied, 366 U.S. 941, 81 S.Ct. 1657 (1961), clearly explained the difference between tort and contract obligations when it stated:

> It must be remembered that we are dealing here with a contract, and therefore with obligations, by hypothesis, voluntarily undertaken, and not, as in the case of tort liability . . . obligations imposed simply by virtue of the authority of the State or Federal Government. This fact in itself

> creates some presumption in favor of applying the law tending towards validation of the alleged contract. 365 U.S. at p. 741 and 81 S.Ct. at p. 893.

In general, the legislatures have not sought to bar such indemnity in all instances. The United States Congress enacted a limited prohibition to contractual indemnity between a ship owner and longshoreman employer, not simply on the basis of public policy, but as a compromise wherein the shipowner's liability to such employees was also limited. See 33 U.S.C.A. § 905(b). Furthermore, Congress recently added § 905(c) which recognizes that *reciprocal* indemnity agreements between a longshore employer and the shipowner were enforceable so long as each party agreed to defend and indemnify the other for the cost of defense and liability for damages arising out of or resulting from the death or bodily injury to their respective employees. See 33 U.S.C.A. § 905(c). The Glendel/Avanti contract does no more.

Petitioner further avers that state law should be "substituted" as maritime law on this issue, since the State Legislatures have limited contractual indemnity for "safety reasons" with respect to people who work in marine environments of the oilfield. Again, this point was never argued nor briefed below, thus it would be difficult for the Court to make these factual conclusions without some evidence. In actuality, reciprocal contractual indemnity can make a job location more safe since liabilities are predictable for each party and the underwriting of risks will insure that all parties will bear some burden of the operation after arms length negotiations concerning the

same. The contractual indemnity agreement between Avanti and Glendel was fully reciprocal, although based on the large number of employees and invitees which Glendel would have had on site, as compared to the few of Avanti, Avanti was in a better position on the bargain, such that petitioner is unable to claim it was coerced into this agreement or that it was in an "unequal" bargaining position.

Furthermore, petitioner's first-time argument that Glendel lacked incentive to provide safe working conditions due to the indemnity provisions in the Avanti/Glendel Drilling contract, is totally untrue based on the facts of this case. As stated above, the reciprocal indemnity provisions act as an incentive to provide a safe place under *all* circumstances arising out of the job site and to promote overall safety for all parties, since they place the burden on the party best able to enforce the safety rules, i.e., the employer who has the power to fire the employee who violates the same. It also allows parties to a particular job endeavor to proportion their risks based on the number of employees and invitees one may have on site.

Finally, despite Avanti's new argument for "safety", there was no finding of fault ever made on the part of Glendel. Petitioner, at one point, argued against indemnity based on Glendel's lack of fault, indicating that Glendel should not have settled its claim for the potential fault. To now claim that the indemnity provision contained in the Glendel/Avanti contract "protects those (like Glendel) who engage in unsafe practices", does not accurately set forth the situation herein, nor does this

case present an appropriate vehicle for Supreme Court review of such an issue.

Although petitioner also urges the court to adopt LOIA as "substitute" maritime law in this instance, this would seem to run contrary to the well-settled principles precluding adoption of state law to control maritime issues where the maritime law is well developed. It is clear that Louisiana does not consider that it has an "overriding interest" in such indemnity agreements. This will be discussed in more detail in Part II below. As the Louisiana Supreme Court in *Rodrigue v. Legros* pointed out:

> The area of indemnity agreements has never been thought to be a special legislative providence of the state. Instead it has generally been governed by common law rules. . . . Because indemnity has not been considered an area subject to overriding state interest, the federal admiralty courts have developed a well-articulated set of jurisprudential rules governing indemnity in maritime contracts.
> 563 So.2d at p. 254.

The Louisiana Supreme Court also cited Judge Hunter's opinion in *O'Dell v. North River Insurance Co.* wherein he stated:

> Contractual indemnity, on the other hand is not a matter that has been the subject of complex and extensive state regulation. State Legislatures have entered the field on only a piecemeal basis in order to alter settled jurisprudential rules. (citations omitted). And, unlike marine insurance, the underlining principles of maritime contractual indemnity are well-established in the jurisprudence. 614 F.Supp. at p. 1559.

As such, there is no true reason to substitute any state's law which may interfere with the uniformity of maritime indemnity agreements, particularly where parties, such as Avanti and Glendel, contemplated that maritime law would be applicable to it.

The Louisiana Oilfield Indemnity Act (La.R.S. 9:2780) should not apply to barge rigs which have the ability to move from location to location and outside the jurisdiction of Louisiana. Substituting any particular state law to a contract capable of performance in a variety of jurisdictions without consideration of all of the consequences, would create difficulty and uncertainty in contracts involving such barges.

It is also noted that petitioner falls into the trap of citing cases involving admiralty jurisdiction over tort in determining whether or not a maritime contract exists. Petitioner cites the case of *Sohyde v. Coastal State Gas Producing Co.*, 644 F.2d 1132, 1138 (5th Cir. 1981), for the principle that the uniformity of maritime law would not be disturbed by substituting state statutory law regarding contractual indemnity in the field of oil and gas. However, Judge Brown, who originally authored *Sohyde*, specifically placed a footnote in his most recent decision concerning the determination of what constitutes a maritime contract to explain that *Sohyde* was not relevant as to whether there existed a maritime contract. See, *Domingue v. Ocean Drilling and Exploration Co.*, 923 F.2d 393, 397 n. 9 (5th Cir. 1991). It is believed that Judge Brown specifically intended to include this footnote so those who would shepherdize the *Sohyde* case later can find this clear explanation and distinction, probably in hopes that the "partisans" to whom he refers in the

footnote would cease citing the misapplication of *Sohyde* to maritime contract cases.

II.

NO STATE COURT CONFLICT

One of the most fanciful arguments submitted for certiorari by petitioner is that somehow the Louisiana Supreme Court's decision of *Rodrigue v. Legros, supra,* is in conflict with the express ruling of the Fifth Circuit Court of Appeals in the case for which certiorari is being requested. Nothing could be further from the truth. A simple reading of the *Rodrigue* case would clearly show that the Louisiana Supreme Court, faced with almost the identical questions presented to the courts below, arrived at the identical conclusion; i.e., reciprocal contractual indemnity provisions contained in a contract to supply a movable drilling barge in a navigable water situation were governed by federal maritime law, and as such, were enforceable even for the indemnitor's own negligence. The opinion is cogent and well written. It is worth time to read the opinion in full since the court provides an extremely good analysis of the issues presented in this case and navigates the questions with little confusion.

Also, being an interpretation of Louisiana law, the *Rodrigue* case should control the issue of whether or not to apply Louisiana's Anti-Indemnity Statute to the contract herein. The court noted that the LOIA would conflict with the federal interest of providing uniformity with respect to maritime law and the treatment of indemnity provisions therein. It stated:

> While the uniformity interest is minimal in many tort cases due to the fortuitous nature of accidental injuries and the strong state interest in providing redress for injuries, this interest is at its zenith when dealing with maritime contracts, which constitute actual commerce. (citations omitted). Those who engage in maritime commercial activity expect the application of uniform federal maritime law; 'in the typical case the transaction will be interstate, the interest commercial, and the consequent exclusion of state law clear.' (citation omitted).
> 563 So.2d at p. 254.

In its opinion, the Louisiana Supreme Court provided four major reasons for its holding that the maritime rule allowing contractual indemnity should prevail over any state law to the contrary. The reasons, in summary, are:

(1) Indemnity agreements are not within the special legislative providence of the states and are not a matter that has been subject to extensive state legislation other than for an occasional statute which alters settled jurisprudential rules.

(2) Federal admiralty courts have well-developed and articulated rules governing indemnity agreements.

(3) As in the instant case, most of the significant events giving rise to litigation involving the indemnity agreements at issue were rooted in maritime commerce, such as the "classic" maritime tort of the principal plaintiff against the party defendants and the fact that the main demand was governed by maritime law.

(4) Finally, the general principles of freedom of contracts require that indemnity provisions

> should be fully enforceable, so that maritime parties may allocate the risks between themselves in doing business. See, 563 So.2d at p. 254-255.

The *Rodrigue* case was not the first expression by a Louisiana Court that LOIA should not be made applicable to indemnity provisions in maritime contracts. The First Circuit Court of Appeals for Louisiana had already held that neither the Louisiana nor the Texas Anti-Indemnity Statute was applicable to invalidate indemnity agreements contained in a contract to provide a drilling barge for a water drilling location. *Cason v. Diamond M. Drilling Co.*, 436 So.2d 1245 (La. App. 1st Cir. 1983). The Court stated specifically:

> We are reluctant indeed and unwilling to create an additional exception to the general rule of the federal courts that indemnity clauses and admiralty contracts shall be enforced as written where, as in this contract, the language of the indemnity provision is clear and unequivocal. 436 So.2d at p. 1253.

Thus, it cannot be said that the decisions of the Louisiana Courts are in any way in a direct conflict with the ruling by the court below. However, in an attempt to obtain this Court's attention, petitioner takes a phrase in *Stoot v. Fluor Drilling Services, Inc.*, 851 F.2d 1514 (5th Cir. 1988), out of context and claims that the case is in conflict with *Rodrigue*. Petitioner argues that the ruling in *Stoot* that nothing in maritime law precludes the parties to a maritime contract from freely choosing Louisiana law (including the Anti-Indemnity Statute) to govern their

contract is in conflict with the *Rodrigue* decision prohibiting the application of the Louisiana Anti-Indemnity Statute by operation of law. Such is not the case. The fact that under federal law, the parties are free to choose Louisiana law to invalidate indemnity provisions in maritime contracts is the same as saying that the parties may choose not to provide indemnity to one another, thus promoting the principle of freedom of contract. It is not the same as saying that the parties *must* apply Louisiana law, where maritime law allows the parties to enter into valid indemnity agreements, if the terms are clear and unequivocal. Maritime law does not mandate indemnity provisions, it simply allows the parties the freedom to contract for the same if they so chose. Therefore, the court in *Rodrigue* was correct that the state cannot impose its own statutory scheme to invalidate indemnity provisions without impinging upon the uniform rule in maritime jurisprudence that such indemnity provisions would be allowed, if the parties so choose. Maritime law does not insist or dictate that indemnity provisions must be incorporated into every contract, thus maritime law would allow the parties to adopt a state law that prohibits indemnity between them as simply part of the freedom of contract. *Rodrigue* is not in any way in conflict with the *Stoot* case.

III.

AVANTI/GLENDEL CONTRACT MEETS MARITIME CONTRACT CRITERIA

Petitioner also urges this Court to resolve "an apparently contradictorily line of cases" regarding the determination of maritime contracts in this area. However, it is

clear that whatever conflicts or contradictions which may have been created by the case-by-case, fact-specific inquiries used to determine whether a particular oilfield service contract was a maritime contract, such did not involve contracts to supply inland drilling barges for navigable water locations. The controlling law has always been that contracts to supply such drilling barges are maritime and there is no conflict or confusion on this point.

A short list of cases can be provided where the maritime status of drilling barges was discussed or where specific mention was made of the maritime contract status of drilling barge contracts. However, literally hundreds of unreported lower court cases have applied this well-settled and unchallenged jurisprudence. The following reported cases are an example of the application of such jurisprudence: *Vickers v. Chiles Drilling Co. v. Ingersoll-Rand Co.*, 822 F.2d 535 (5th Cir. 1987); *Theriot v. Bay Drilling Corp.*, 783 F.2d 527 (5th Cir. 1986); *Lewis v. Timco*, Inc., 716 F.2d 1425 (5th Cir. 1983), remanded, 736 F.2d 163 (5th Cir. 1984), reh'g denied, 744 F.2d 94 (5th Cir. 1984); *Roberts v. Williams-McWilliams Co., Inc.*, 648 F.2d 255 (5th Cir. 1981); *Corbitt v. Diamond M. Drilling Co.*, 654 F.2d 329 (5th Cir. 1981); *Spinks v. Chevron Oil Company*, 507 F.2d 216 (5th Cir. 1975); *Transcontinental Gas Pipe Line Corp. v. Mobile Drilling Barge Mr. Charlie*, 424 F.2d 684 (5th Cir. 1970); *LeBleu v. Mud Control Equipment Corp.*, No. 90-4248 (E.D.La. 1991), (LEXIS, Genfed library), (WESTLAW, Allfeds database); *Seaux v. Lynn*, 708 F.Supp. 134 (E.D.La. 1989); *Bolfa v. Pool Offshore Co.*, 623 F.Supp. 1177 (W.D.La. 1985); *O'Dell v. North River Insurance, Co.*, 614 F.Supp. 1556 (W.D.La. 1985); *Terry v. Rebstock Drilling Co.*, 601

F.Supp. 820 (E.D.La. 1985); *Rodrigue v. Legros,* 563 So.2d 248 (La. 1990); and *Cason v. Diamond M. Drilling Co.,* 436 So.2d 1245 (La.App. lst Cir. 1983).

Drilling barge contracts require one party to provide a specially designed and built drilling barge which is specifically used to maneuver and navigate through navigable waterways, to locate and anchor itself in a body of water accessible only by other watercrafts (or seaplanes and helicopters) and perform a drilling operation in a maritime setting, all of which would have a high impact on maritime commercial activity. Inland drilling barges are highly mobile and can move from one location to another only by way of water and as such may operate in the inland water and off the shores of Texas, Mississippi, Louisiana, Alabama or other coastal states. Frequently, contracts involving drill barges are long-term contracts and not simply for one well location, such that the same contract may be enforceable in a variety of jurisdictions.

All aspects of ownership and operation are governed by maritime law. The reporting requirements, titling, certifications, navigation, operations, insurance, environmental regulations and crew requirements come from maritime rules and regulations. For these reasons, drilling barge contracts have always been considered to be governed by maritime law, at least in the Fifth Circuit Court of Appeals, where the use of drill barges are prevelant. Thus, it is not the least bit strange or inconsistent for the uniform body of maritime law to apply to the Glendel/Avanti contract.

In light of the fact that this jurisprudential rule is so well settled, consideration of altering it should not be

made on the basis of the undeveloped record presented in the case below. In view of the fact that the parties have long contemplated and adjusted to the realities that such contracts shall be governed by general maritime law, the abandonment of the rule may "upset stable commercial expectations." See, Judge Scalia's concurring opinion in *Sisson v. Ruby*, ___ U.S. ___, 110 S.Ct. 2892, 2901 n.4 (1990), intimating that settled maritime contract jurisprudential rules are a beneficial stabilizing force in commercial settings as they may be easily learned and applied.

The apparent inconsistencies and confusion referred to by petitioner arise in other types of cases where normally land-based oilfield operations, tangentially or temporarily performed on a vessel, provoke the parties to argue the improper application of maritime law to their contracts. This is where the inconsistency creeps into the discussions involving oilfield contracts. Petitioner is now attempting to use such rulings, which were designed to eliminate non-vessel contracts fortuitously applying in a maritime setting, to disqualify contracts dealing with drilling barges and vessels simply because those contracts may also involve oilfield operations.

The "rather absurd inconsistencies" noted by the court below involve the application of maritime law to inland drilling barges and state law to fixed platform drilling rigs located on the Outer Continental Shelf. These consequences result directly from the operation of the Outer Continental Shelf Lands Act as it applies to offshore drilling. 43 U.S.C.A. § 1331, et seq. This Court commented in *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 105 S.Ct. 1421 (1985), that the OCSLA itself draws a clear *geographical boundary* which predictably resulted in the

inconsistency. The court noted that it was not within its realm to resolve the inconsistency and in fact stated:

> As we have said before in this area, if Congress' coverage decisions are mistaken as a matter of policy, it is for Congress to change them. We should not legislate for them. 105 S.Ct. at p. 1429.

Although petitioner claims that *Thurmond v. Delta Surveyors*, 836 F.2d 952 (5th Cir. 1988), is somehow in conflict with the decisions reached in the court below, it is clear that petitioner misses the point stated in that case. The contract in *Thurmond* was a state-oriented contract for non-maritime services which only tangentially called for the service of a vessel and therefore was not intended by the parties to be governed by maritime law. The factors set forth in the decisions of *Davis & Sons, Inc v. Gulf Oil Corp.*, 919 F.2d 313 (5th Cir. 1990), reh'g denied, 924 F.2d 1054 (1991), and also as utilized in *Domingue v. Ocean Drilling and Exploration Co.*, 923 F.2d 393 (5th Cir. 1991), specifically articulate a consistent standard for analysis of oilfield contracts to determine whether they will be governed under maritime law. This consistent underlying analysis is for determining whether those "gray" contracts are to be governed by maritime law. However, by applying the factors set forth in the *Davis & Sons* case to the present case, the Glendel/Avanti contract and its indemnity provision are clearly to be governed by general maritime law.

As a final argument, petitioner urges the court to find that the drilling barge was not a "vessel" for the purposes of maritime law. As respondent pointed out to the court below, the vessel status of the drilling barge was never

challenged at the district court level and therefore no record was developed as to properly place before the court all of the factors necessary for it to reconsider the longstanding jurisprudence finding that semi-submersible drilling barges are vessels. There are no answers to the relevant questions in the record, as to whether the drilling barge had Coast Guard certification, whether it had licensed marine personnel operating the same, the number and frequency of the various voyages, the susceptibility of the vessel to sea movement, tides, etc., whether it was provided coverage under Marine, Hull and Protection and Indemnity insurance policies and all other relevant issues that might be important in determining this novel challenge, since all parties had conceded that the Drilling Barge met the accepted definition of vessel.

For over 30 years, drilling barges have been classified as vessels. Although certain cases have challenged vessel status with regard to other types of work barges, which were not shown to have all the indicia of vessel status at trial, in this case, petitioner made no inquiry on any of these points. Basically, petitioner's argument at this level is in the abstract. Furthermore, petitioner attempts to string cites of cases together which deal with totally separate and distinct factual settings to argue that the drill barge was not a vessel. The only facts which were found by the district court in this case was that the drill barge functioned as a vessel in navigation under the facts and circumstances presented to it. As such, it is not appropriate for the petitioner to ask at this late date for this finding to be reconsidered.

CONCLUSION

1.

It is respectfully submitted that the writ should be denied not simply because petitioner's policy argument was not properly submitted for full consideration by the court below, but because maritime commerce is promoted when contractual indemnity provisions between parties of equal bargaining positions are enforced as written. Allowing the parties to a maritime contract to enter into a reciprocal indemnity agreement supports the principle of freedom of contract in the maritime commercial setting, allowing the parties to economically allocate the risk proportionate with one's exposure to the task at hand, so as to allow each party to properly assess his cost of doing business.

2.

Petitioner's allegations of a conflict between federal and state law is an extreme exaggeration, in view of the fact that the Louisiana Supreme Court, in considering the same issues involved in an almost identical situation, reached the same conclusion, i.e., a contract to supply a drilling barge should be governed by maritime law, and not Louisiana law, and as such, reciprocal indemnity agreements between parties of equal bargaining power should be enforced as written. The court in reaching this conclusion found that Louisiana did not have an over-riding state interest in applying its statutes concerning "contractual indemnity shifting".

3.

Finally, the writ should be denied insofar as there is no confusion in the law with regard to the determination that maritime law governs indemnity provisions in contracts to supply inland drilling barges under the applicable criteria set forth in the decisions rendered by this court and the lower courts. The contract specifically pertains to and calls for the use of a vessel to perform a job in a maritime setting, all of which impacts on maritime commercial activity, and as such should be maritime. Furthermore, any inconsistency or "absurd results" which have occurred because of the arbitrary lines of jurisdiction drawn by the Outer Continental Shelf Lands Act (which is not involved in this case) is for the Congress to resolve and does not require that this Court alter the longstanding jurisprudence that maritime law controls the indemnity provisions found in contracts to supply drilling barges.

Respectfully submitted,

ONEBANE, DONOHOE, BERNARD,
TORIAN DIAZ, MCNAMARA &
ABELL

By DOUGLAS W. TRUXILLO
Post Office Drawer 3507
Lafayette, Louisiana 70502
Telephone: (318) 237-2660

Attorney for Glendel Drilling Company